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Chua Kay Hock & Anor v Lee Hoon Poi

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-04(W)-610–12 OF 2018
YAACOB MD SAM, ABU BAKAR JAIS AND GUNALAN MUNIANDY JJCA
8 JULY 2022

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Damages — Appeal — Appeal against quantum — Appellants suffered injuries from accident with respondent — High Court set aside award for cost of bionic prosthesis made by sessions court and declined to award punitive damages — Whether judicial commissioner erred in setting aside award for cost of bionic prosthesis for first appellant — Whether punitive damages should be awarded to appellants

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This was an appeal against the decision of the learned judicial commissioner ('LJC') of the Johor Bahru High Court in an appeal from the decision of the sessions court on the issue of quantum only in a running down action. The challenge to the decision of the LJC by the appellant centred around the order to set aside the award for the cost of bionic prosthesis made by the learned sessions court judge ('LSCJ') and the purported entitlement of the appellant to punitive damages (exemplary and aggravated damages) which the LJC declined to award. An accident had occurred on 17 November 2015 between the first appellant's motorcycle and a car driven by the respondent. The second appellant was riding pillion with the first appellant and was also injured. As the result of the accident, the first appellant's right lower limb was amputated at the above knee level. Before the accident, the first appellant was working in Singapore as a senior operations executive/supervisor. He went back to work four months after the accident and was paid full salary. He tendered the resignation in September 2016. After hearing evidence led by parties, the LSCJ found that the respondent was 100% liable for the accident. In terms of the quantum awarded it was the finding of facts of the LSCJ that bionic prosthesis prescribed by the appellants' expert was more suitable for the first appellant and she awarded RM2m for the said prosthesis. The LSCJ did not make any finding regarding the punitive damages prayed by the appellants in relation to the conduct of the respondent in abandoning the appellants on the road. On liability, the LJC affirmed the findings of the LSJC. However, the award of bionic/microprocessor prosthesis by the LSCJ was set aside by the LJC and the LJC reduced to the said award to RM620,370 being the cost for mechanical prosthesis. The issues for consideration were: (a) whether the LJC had erred in law and in fact in setting aside the award for cost of bionic prosthesis for the

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first appellant made by the LSCJ; and (b) whether punitive damages should be awarded to the appellants.

Held, dismissing the appeal:

(1) The LJC had correctly applied the cardinal principle of an award of damages that it was meant to be compensatory; and had taken into account important and relevant considerations in arriving at his conclusion on the type of prosthesis that should be awarded to the appellant to reasonably and appropriately compensate him and to avoid unjust enrichment. The LCJ had not made any obvious error of fact or law on concluding that the costs of a state of the art prosthesis at RM2m was not sustainable because: (a) the appellant did not produce any evidence from his employer that he was unable to work as before due to his disabilities or residuals; and (b) awards for actual loss of earnings in the sum of RM96,000 and future loss of earnings in the sum amount of RM960,000 had been made. It was not erroneous or baseless for the LJC to hold that if a bionic prosthesis were to be allowed together with loss of future earnings, it would unreasonably set a precedent for all plaintiffs in similar circumstances to claim for a bionic prosthesis instead of a medium, reasonably priced hydraulic prosthesis leg. The much more reasonably priced mechanical prosthesis had for generations been awarded as compensation for amputation cases. More importantly, the sophisticated state of the art bionic leg was not widely used in the country and known to lack facilities for after-sales service or repair if it breaks down. The award of future loss of earnings should not by itself justify the rejection of a state-of-the-art bionic prosthesis. The LJC had taken into account relevant considerations and factors in concluding that the said prosthesis should not be awarded under the circumstances of this case (see paras 38–41).

(2) The requisite evidence to justify an award of exemplary damages or aggravated damages was wholly non-existent before the trial court. Hence, there was no basis for the appellant's contention that the LJC had erred in declining to award this head of damages (see para 45).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK') Mahkamah Tinggi Johor Bahru dalam rayuan terhadap keputusan mahkamah sesyen mengenai hanya isu kuantum dalam tindakan pelanggaran. Cabaran terhadap keputusan PK oleh perayu tertumpu pada perintah untuk mengetepikan award bagi kos prostesis bionik yang dibuat oleh hakim mahkamah sesyen yang bijaksana ('HMS') dan hak perayu yang dikatakan untuk ganti rugi punitif (ganti rugi teladan dan teruk) yang PK enggan berikan. Satu kemalangan telah berlaku pada 17 November 2015 antara motosikal perayu pertama dan kereta yang dipandu oleh responden. Perayu

kedua membonceng dengan perayu pertama dan turut cedera. Akibat kemalangan itu, anggota bawah kanan perayu pertama telah dipotong pada paras atas lutut. Sebelum kemalangan itu, perayu pertama bekerja di Singapura sebagai eksekutif kanan operasi/penyelia. Dia kembali bekerja empat bulan selepas kemalangan itu dan dibayar gaji penuh. Dia telah mengemukakan peletakan jawatan pada September 2016. Selepas mendengar keterangan oleh pihak-pihak, HMS mendapati responden bertanggungjawab 100% di atas kemalangan itu. Dari segi kuantum yang diberikan adalah dapatan fakta HMS bahawa prostesis bionik yang ditetapkan oleh pakar perayu adalah lebih sesuai untuk perayu pertama dan beliau menganugerahkan RM2 juta untuk prostesis tersebut. HMS tidak membuat sebarang penemuan berhubung ganti rugi punitif yang dipohon oleh perayu berhubung kelakuan responden meninggalkan perayu di jalan raya. Atas liabiliti, PK mengesahkan penemuan HMS. Walau bagaimanapun, award prostesis bionik/mikropemproses oleh HMS telah diketepikan oleh PK dan PK mengurangkan award tersebut kepada RM620,370 sebagai kos untuk prostesis mekanikal. Isu-isu untuk pertimbangan adalah: (a) sama ada PK telah terkhilaf dari segi undang-undang dan fakta dalam mengetepikan award untuk kos prostesis bionik untuk perayu pertama yang dibuat oleh HMS; dan (b) sama ada ganti rugi punitif patut diberikan kepada perayu.

Diputuskan, menolak rayuan:

(1) PK telah menggunakan dengan betul prinsip kardinal award ganti rugi yang mana ia bertujuan sebagai pampasan; dan telah mengambil kira pertimbangan penting dan relevan dalam membuat kesimpulannya mengenai jenis prostesis yang patut diberikan kepada perayu untuk memberi pampasan yang munasabah dan sewajarnya kepadanya dan untuk mengelakkan pengayaan yang tidak adil. PK tidak membuat sebarang kesilapan fakta atau undang-undang yang jelas apabila membuat kesimpulan bahawa kos prostesis canggih pada RM2 juta adalah tidak dapat dipertahankan kerana: (a) perayu tidak mengemukakan sebarang bukti daripada majikannya bahawa dia tidak dapat bekerja seperti sebelum ini disebabkan oleh kecacatan atau kecederaannya; dan (b) award untuk kehilangan pendapatan sebenar dalam jumlah RM96,000 dan kehilangan pendapatan masa hadapan dalam jumlah RM960,000 telah dibuat. Adalah tidak salah atau tidak berasas bagi LJC untuk memutuskan bahawa jika prostesis bionik dibenarkan bersama-sama dengan kehilangan pendapatan masa hadapan, ia secara tidak munasabah akan menetapkan duluan untuk semua plaintif dalam keadaan yang sama untuk menuntut prostesis bionik dan bukannya kaki prostesis hidraulik dengan harga yang berpatutan. Prostesis mekanikal dengan harga yang lebih munasabah telah diberikan selama beberapa generasi sebagai pampasan untuk kes amputasi. Lebih penting lagi, kaki bionik yang canggih itu tidak

digunakan secara meluas di negara ini dan diketahui kekurangan kemudahan untuk perkhidmatan selepas jualan atau pembaikan jika ia rosak. Award kehilangan pendapatan pada masa hadapan seharusnya tidak dengan sendirinya membenarkan penolakan prostesis bionik yang canggih. PK telah mengambil kira pertimbangan dan faktor yang berkaitan dalam menyimpulkan bahawa prostesis tersebut tidak seharusnya diberikan dalam keadaan kes ini (lihat perenggan 38–41).

(2) Keterangan yang diperlukan untuk mewajarkan suatu award ganti rugi teladan atau ganti rugi teruk tidak wujud sepenuhnya di hadapan mahkamah bicara. Oleh itu, tidak ada asas untuk dakwaan perayu bahawa PK telah terkhilaf dalam menolak untuk memberikan bahagian ganti rugi ini (lihat perenggan 45).]

Cases referred to

Bong Chee Min v Jacknoris Golinjun [2020] MLJU 151; [2020] 1 LNS 120, HC (refd)
Flint v Lovell [1935] 1 KB 354, CA (refd)
Kerry Donnelly v Fas Products Ltd 2004 SCLR 678 (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, SC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Appeal from: Civil Appeal No JA-12B-51–04 of 2018 (High Court, Johor Bahru)

Teo Han Ley (with Lee Yen Yee) (Teo & Assoc) for the appellant.
Asley Lim Suat Leng (SN Fam & Co) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] This appeal arises from a decision of the learned judicial commissioner ('LJC') of the Johor Bahru High Court in an appeal from a decision of the sessions court on the issue of quantum only in a running down action. Before us, the challenge to the decision of the LJC by the plaintiff/appellant centred around the order to set aside the award for the cost of bionic prosthesis made by the learned sessions court judge ('LSCJ')and the purported entitlement of the plaintiff to punitive damages (exemplary and aggravated damages) which the LJC declined to award.

BRIEF FACTS

[2] An accident had occurred on the 17 November 2015 around 7.50pm between the first appellant's motorcycle and a car driven by the respondent. The second appellant was riding pillion with the first appellant, and was also injured.

[3] As the result of the accident, the first appellant's right lower limb was amputated at the above knee level.

[4] Before the accident, the first appellant is working in Singapore as a Senior Operations Executive/Supervisor.

[5] He went back to work in Singapore after the accident in June 2016 ie four months after the accident and was paid full salary. He tendered the resignation in September 2016.

[6] After hearing evidence led by parties, the learned sessions court judge made her findings of fact that the defendant was 100% liable for the accident.

[7] In terms of the quantum awarded, in particular, it was the finding of facts of the LSCJ that bionic prosthesis prescribed by the appellants' expert is more suitable for the first appellant and she awarded RM2m for the said prosthesis.

[8] The LSCJ did not make any finding regarding the punitive damages (exemplary and aggravated damages) prayed by the appellants in relation to the conduct of the respondent in abandoning the appellants on the road.

[9] On liability, the LJC affirmed the findings of the LSJC. However, the award of bionic/microprocessor prosthesis by the LSCJ was set aside by the LJC and the LJC reduced to the said award to RM620,370 being the cost for mechanical prosthesis.

SUBMISSION BY THE APPELLANTS

[10] The learned counsel for the appellants submitted that the LJC has erred in disturbing the award of RM2m being the cost of bionic prosthesis for the first appellant by the LSCJ.

[11] The respondent did not raise the issue in the lower court that when loss of future earnings was awarded, then a mechanical prosthesis that is proven to

be not suitable for the first appellant should be awarded. Therefore, the LJC is not entitled to base his decision on non-issues.

[12] The LJC had ignored the most crucial point in the award of prothesis, ie the suitability of the prosthesis for the first appellant. Evidence in court as to the suitability of the prosthesis for the first appellant was never considered by the LJC. Instead, the LJC indulged himself in the speculation that the first appellant will surely not want to return to work and need not have a state of the art bionic prosthesis to facilitate return to work.

SUBMISSION BY THE RESPONDENT

[13] The counsel for the respondent submitted that the costs of prosthesis of RM2m cannot be allowed reason being that the first appellant was holding a position as a supervisor and having 30 staffs under his command. The first appellant had resumed back to work after the accident and he choose to tender his resignation after resuming back to work for four months. Future loss of earning was allowed amounting to RM960,000 and actual loss of earning was allowed amounting to RM96,000.

[14] The counsel for the respondent further submitted that if the bionic leg is allowed and future loss of earning is also allowed, it will become a firstprecedent for all the claimant to claim for bionic leg instead of medium reasonable hydraulic prosthesis leg. Hydraulic leg was used in the government sector and it is very popular in Malaysia and it is far more cheaper than a bionic leg and there are no facilities in Malaysia when the bionic leg is broken.

OUR DECISION

[15] As summarised by the appellants, their main grounds of appeal on quantum are confined to the following issues:

(a) whether the learned judicial commissioner ('LJC') had erred in law and in fact in setting aside the award for cost of bionic prosthesis for the first plaintiff/appellant made by the LSCJ having heard evidence from both parties? and

(b) whether punitive damages (exemplary and aggravated damages) should be awarded to the plaintiffs after taking into account the conduct of the defendant in abandoning the plaintiffs on the road after the accident had happened?

[16] In regard to the issue of quantum, the thrust of the appellants' submission in this appeal was that the quantum awarded was essentially a finding of fact of the LSCJ that bionic prosthesis prescribed by the plaintiffs'

expert is more suitable for the first plaintiff (as opposed to the mechanical prosthesis prescribed by the defendant's expert) and she correctly awarded RM2m for the said prosthesis. However, the LSCJ did not make any finding regarding the punitive damages (exemplary and aggravated damages) prayed for by the plaintiffs in relation to the conduct of the defendant in abandoning the plaintiffs on the road following the accident.

[17] We would first focus on the award for prosthesis on which as pointed out to us, the issue before the sessions court was primarily which prosthesis is more suitable for the first plaintiff, the bionic/microprocessor prosthesis prescribed by the plaintiff's certified prosthesis and orthotist (PW7 Kau Jan Yeow from Endolite Asia Sdn Bhd) or the mechanical prosthesis prescribed by the defendant's certified prosthesis and orthotist (DW2 Siti Izaura from Limb Brace Rehab Appliances).

[18] In respect of the award made by LSCJ in favour of the plaintiffs, their contention was that the LSCJ made a finding of fact that the bionic/microprocessor prosthesis prescribed by the plaintiffs' certified prosthetist and orthotist was more suitable for the first plaintiff due to several factors.

[19] However, on appeal, the above award was set aside by the LJC who held that the award of RM2m was wholly unreasonable and against the usual trend of contemporary awards. It was the appellant's submission that the LJC's decision to disturb the trial court's award of RM2m for bionic prosthesis in preference to an award of RM620,370 for mechanical prosthesis was erroneous and ought to be reversed.

[20] It is important for us to consider the approach taken by the LJC in arriving at his decision and the reasons for his conclusion as to the award being excessive. We would also take cognizance of the well settled principle that an appellate court should be slow to interfere with the assessment of damages by the trial judge and should only do so when the trial judge had acted on wrong principles or made a wholly erroneous estimate of the damages suffered.

[21] Reference needs to be made only to the leading case of *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 where the Supreme Court held, inter alia, as follows:

> Now, in an appeal on quantum of damages it is essential in order to come to a conclusion to bear in mind certain principles which are well established. The appeal court is slow, disinclined to interfere with the judge's finding merely because the appeal court thinks that if the case had been before it in the first instance a lesser sum would have been awarded. Azmi, CJ (Malaya) (as he then was) giving the judgment of the Federal Court in *Topaiwah v Salleh* [1968] 1 MLJ 284, 285 said that:

> ... So far as this court is concerned we should, to paraphrase Greer LJ in *Flint v Lovell* be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case.

(See *Flint v Lovell* [1935] 1 KB 354).

[22] In determining whether the award for bionic prosthesis ought to be disturbed, the LJC took into account the following factors:

(a) the appellant had appealed that a sum of RM620,370, being the quotation from Limb Brace, should be allowed instead, as Limb Brace had been an established supplier to hospitals, SOCSO claims and other governmental agencies;

(b) the firstrespondent had contended that an earlier report by SD2 had stated that a bionic prosthesis would have cost RM3,199,347.12, in a way implying that the quotation of RM2,958,881 had been cheaper. The respondent had also relied on a Scottish Case of *Kerry Donnelly v Fas Products Ltd* 2004 SCLR 678 that restitution in integrum applied, such that an injured party would be entitled to the best available;

(c) while sympathy may rightly be felt for an accident victim, there must nevertheless be some measure of proportionality maintained such that shorn of all the legal principles applied, there would not be a sense of incredulity and scepticism with the eventual outcome. The amount awarded should not be at the expense of reason and good sense, in the manner of the end justifying the means; and

(d) the award of RM2m, or if enhanced to RM2,958,881 as prayed for in the cross-appeal, would pale in comparison to the pain and suffering for all the personal injuries. Even by having that bionic prosthesis, it would be a far cry to expect the respondent to be put back into the same position that he was in before the incident.

[23] Based on the foregoing considerations, the LJC set aside the LSCJ's award for prosthesis in the sum of RM2m and reduced it to RM620,370 having concluded that the former award cannot be reconciled with the overall scheme of compensatory awards in this case considering that loss of future

earnings had been given. According to the LJC, the respondent will surely not want to return to work and need not have a state of the art bionic prosthesis to facilitate return to work.

[24] The appellant challenged the position taken by the LJC on this point by contending that bionic prosthesis can be awarded in conjunction with an award for partial loss of future earnings. Further, that, in any event, even if loss of future earnings has been awarded, it does not automatically mean that a mechanical prosthesis that is proven to be not suitable for the first plaintiff should be awarded by citing the case of *Bong Chee Min v Jacknoris Golinjun* [2020] MLJU 151; [2020] 1 LNS 120 where the High Court had awarded bionic prosthesis for the plaintiff in the sum of RM2,191,430.22 and partial future loss of earnings (50% of pre-accident earnings).

[25] A comparison was drawn to the present case where the nature of loss of future earnings awarded by the LSCJ was essentially an award for partial loss of future earnings as she had taken into account of the post-accident salary of the first plaintiff in the award.

[26] The crux of the appellant's challenge against the LJC's decision was that he had erred by failing to appreciate that the suitability of the type of prosthesis concerned should be the foremost consideration in deciding which of the two types of prosthesis should be chosen. As such, that whether the award of loss of future earnings had been given is not a point to be considered in the award for the cost of prosthesis as the LSCJ had made a specific finding on this point and was ignored by the LJC in his deliberation.

[27] The said specific finding was that the award in regard to the prosthesis was not given to ensure that the plaintiff would be able to secure employment but purely as a replacement for the amputated leg. We were urged by the appellant to consider the LSCJ's decision to award the cost for a bionic prosthesis in preference to the mechanical or manual prosthesis to be a finding of fact that ought not to be disturbed as it was not plainly wrong or wrong in principle in any respect. In deliberating on this issue, we would examine the reasons given by the LSCJ for arriving at the said decision.

[28] In gist, these are briefly the reasons in support of the LSCJ's finding:

(a) the bionic prosthesis was more suitable for the first plaintiff as it had better functions;

(b) even though it was pricey, it would provide more comfort and function better compared to the mechanical prosthesis;

(c) it would serve as a replacement for the right knee that the plaintiff had lost for good due to the accident;

(d) the mechanical prosthesis from Limb Brace Rehab Appliances ('Limb Brace') that the first plaintiff had been wearing until the time of the trial was not suitable for him for several reasons, amongst others:

(i) it had caused skin peeling, redness, itchiness, etc, as shown to the LSCJ during the trial; and

(ii) it had caused discomfort and hyperextension of the intact lower limb as demonstrated to the court by PW7, the plaintiffs' certified prosthetist and orthotist purportedly as a result of wearing the said mechanical prosthesis.

[29] The appellants pointed out to us that the LSCJ had adopted the recommendation of their expert/orthopaedic surgeon (Dr Yoga) as per his report that the Endolite prosthesis should be considered the better alternative.

[30] In conclusion, the LSCJ said that the award of bionic prosthesis to the first plaintiff was fair and reasonable because it was not excessive but most importantly, it restored the all three functions of skeletal, muscular and neural for an amputee like first plaintiff.

[31] Before us, the appellants submitted that it was the trial court's finding of fact that the award of bionic prosthesis was reasonable and appropriate for the first plaintiff based on the LSCJ's evaluation of all the evidence presented and the expert opinions tendered.

[32] As such, that it was erroneous for the LJC to disturb the finding of fact which was not plainly incorrect or wrong in principle. The errors of the LJC were contended to be these:

(a) it is trite that preference of expert opinion is the discretion of the trial judge, the discretion being her preference of the plaintiff's expert opinion on the prescription of the bionic prosthesis. The LSCJ had provided extensive reasons why bionic prosthesis prescribed by PW7 was awarded;

(b) the above finding of fact by the LSCJ was found to be erroneous by the LJC. In fact, those issues which are crucial in the determination of whether bionic or mechanical prosthesis is more suitable for the first plaintiff were totally ignored;

(c) the LJC had gone against the trite principle of appellate inference in setting aside the cost of bionic prosthesis for the first plaintiff awarded by the trial court and substantially reducing the award on the prosthesis

from RM2m to RM620,370. He had wrongly disturbed the trial court's decision on this head of claim by substituting it with an award for mechanical prosthesis instead; and

(d) the LJC did not provide any cogent reason to justify his interference against the finding of fact and/or award of damages in respect of the prosthesis by the LSCJ who had the advantage of hearing the evidence at the trial.

[33] As summarised by the appellant, the LJC's decision to substitute an award of mechanical prosthesis for the award of bionic prosthesis made by the LSCJ was premised on these grounds:

(a) the award of RM2m cannot be reconciled with the overall scheme of compensatory awards in this case, where loss of future earnings had been given; and

(b) the first plaintiff will surely not want to return to work and need not have a state of the art bionic prosthesis to facilitate return to work.

[34] It was contended that the LJC had fallen into error in his decision by taking into consideration a non-issue in regard to determining the appropriate award for prosthesis that the first plaintiff was entitled to. The said non-issue was the firstaward of loss of future earnings which the respondent never raised as a ground to lower the award for prosthesis to the cost of mechanical prosthesis as against a bionic prosthesis. As such, that the LJC was wrong in principle in deciding the appeal on a non-issue (see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 ('SC')).

[35] It was also highlighted to us that the weight of relevant evidence adduced before the trial court distinctly pointed to the bionic prosthesis being more suitable for the first plaintiff. A comparison was made of the experts produced by both parties where the plaintiff's expert (PW7) was registered with the Board of Engineers Malaysia as a Graduate Biomedical Engineer, while DW2 (the defendant's expert) was not registered at all. Neither did DW2 have any affiliation with any prosthetic related professional body and was admittedly unable to comment whether the bionic prosthesis was suitable for the first plaintiff.

[36] The crux of the plaintiffs' case was that their orthopaedic surgeon, Dr Yoga, whose opinion the LSCJ had accepted had concluded in his report that:

> The patient requires a right above knee prosthesis. To have good outcome the prosthesis should have good knee movement/locking mechanism and good ankle energy return. Kindly get the cost of such prosthesis from companies such as ENDOLITE.

A **[37]** Contrary to the plaintiffs' contention, the defendant's orthopaedic surgeon, Dr Peraba, had in fact not concluded that the mechanical prosthesis from Limb Brace was not suitable for the first plaintiff but merely highlighted his claim that the said above knee prosthesis did not fit him well. Dr Peraba's recommendation was for him to return to Limb Brace who were also responsible for his physical training and rehabilitation. It is only in the event that he was still unable to use this device that he should procure quotations from other prosthetic and orthotic centres. It was not shown that the plaintiffs had taken this vital step as recommended to justify the claim for a bionic prosthesis on the basis of the unsuitability on incompatibility of the mechanical prosthesis to first plaintiff's condition.

[38] Having carefully scrutinised the relevant facts and evidence before the trial court, the opposing contentions of the parties to this appeal and the established principles applicable to the proof of special damages, amongst others, that the cardinal principle of an award of damages is that it is meant to be compensatory, we are not persuaded by the appellant's submission that the LJC had made a decision that was plainly wrong or erroneous. Instead, we are satisfied and wholly agree with the respondent's contention that the LJC had correctly applied the said principle and taken into account important and relevant considerations in arriving at his conclusion on the type of prosthesis that should be awarded to the appellant to reasonably and appropriately compensate him and to avoid unjust enrichment.

[39] In gist, the LJC had, in our considered view not made any obvious error of fact or law on concluding that the costs of a state of the art prosthesis at RM2m was not sustainable for these reasons:

(a) the appellant at the material time was holding the position of a supervisor and had under his command and supervision 30 staff;

(b) he had resumed work after the accident but chose to tender his resignation after four months upon resumption of work;

(c) he did not produce any evidence from his employer that he was unable to work as before due to his disabilities or residuals; and

(d) awards for actual loss of earnings in the sum of RM96,000 and future loss of earnings in the sum amount of RM960,000 had been made.

[40] In our considered view, it was not erroneous or baseless for the LJC to hold that if a bionic prosthesis were to be allowed together with loss of future earnings, it would unreasonably set a precedent for all plaintiffs in similar circumstances to claim for a bionic prosthesis instead of a medium, reasonably-priced hydraulic prosthesis leg. It would be fair for us to observe that the much more reasonably priced mechanical prosthesis had for

generations been awarded as compensation for amputation cases. As highlighted by the respondent to us and taken into account by the LJC, the hydraulic leg is used widely in the public service/government sector and known to be popular in Malaysia over the years. More importantly, the sophisticated state of the art bionic leg is not widely used in the country and known to lack facilities for after-sales service or repair if it breaks down. Additionally, it is trite principle that a plaintiff seeking compensatory damages is required to mitigate his loss and is entitled only to reasonable compensation and not exorbitant awards save on grounds of necessity in exceptional circumstances when a reasonable alternative is wholly unavailable or inappropriate. There must be sufficient justification shown by the victim for the award of compensation for well above the trend of contemporary awards.

[41] Notwithstanding that, as contended by the appellant, the award of future loss of earnings should not by itself justify the rejection of a state-of-the-art bionic prosthesis. We are inclined to agree with the respondent's contention that the LJC had taken into account relevant considerations and factors in concluding that the said prosthesis should not be awarded under the circumstances of this case.

EXEMPLARY AND/OR AGGRAVATED DAMAGES ('ED' AND 'AD')

[42] We do not propose to deliberate at length on this aspect of the plaintiff's claim as this head of damages was not pleaded in the pleading. Neither was it raised at the trial in the sessions court nor at the High Court on appeal.

[43] We are in agreement with the respondent that the nature of this type of damages is punitive as compared to compensatory damages such as SD and GD, ED and AD are regarded in principle as special and exceptional damages and will only be awarded when it is demonstrated on evidence and circumstances that the defendant's conduct was not only wrongful but also objectionable for having subjected the plaintiff to humiliating circumstances and/or loss of reputation.

[44] To justify the award, it cannot just be premised on the loss or injury suffered by the plaintiff but the conduct of the defendant must be looked at carefully and a determination made whether it was of such a degree that it had humiliated the plaintiff. It is meant to be punitive to act as a deterrent against conduct that should be disapproved and denounced. In essence, the nature of the defendant's misconduct should be the paramount consideration. We need only to refer to the Federal Court case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 where it was observed that:

A Exemplary damages were not intended to compensate the plaintiff and were not recoverable as a matter of right. The amount of exemplary damages awarded was left to the judge's discretion and was determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant. The quantum of exemplary damages to be awarded must be
B appropriate to the wrongdoing inflicted on the parties involved. It must not be uncontrolled or arbitrary and must be of an amount that was the minimum necessary to achieve its purpose in the context of a particular case (see para 43).

[45] Upon our consideration, the requisite evidence to justify an award of
C ED or AD was wholly non-existent before the trial court. Hence, there was no basis for the appellant's contention that the LJC had erred in declining to award this head of damages.

CONCLUSION

D

[46] Premised on the foregoing grounds, we would conclude that the appellant had failed to demonstrate to us that the LJC had failed to judicially appreciate the totality of the evidence or correctly apply the principles applicable to award to damages in negligence actions for personal injuries and
E related losses. In our considered view and judgment, the LJC had not arrived at a decision that was erroneous in principle or fact to warrant appellate interference in this instance as relevant considerations and factors had been taken into account in arriving at the said decision.

F **[47]** We, therefore, hold that this appeal is clearly devoid of merits, and baseless in law and fact. Accordingly, we dismiss this appeal and affirm the decision of the LJC. As the appellant was an accident victim who had suffered serious injuries, we exercised our discretion to order the parties to bear their own costs despite the appellant having lost this appeal.

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Appeal dismissed.

Reported by Ahmad Ismail Illman Mohd Razali

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